SINGAPORE REPORTS

Sim Ah Cheoh & Ors v Public Prosecutor

COURT OF CRIMINAL APPEAL (SINGAPORE) — CRIMINAL APPEAL NO 12 OF 1988
YONG PUNG HOW CJ, CHAN SEK KEONG AND THEAN JJ
31 MAY 1991

Criminal Law — Dangerous drugs — Trafficking in — Transportation of drugs — Inference of transportation — Misuse of Drugs Act (Cap 185, 1985 Ed), s 5(a)

Criminal Procedure — Cautioned statement — Cross examination by recorder — Whether statement admissible — Criminal Procedure Code (Cap 68, 1985 Ed), s 122(6)

Criminal Procedure — Accused remaining silent after defence called — Test to be applied in convicting accused — Criminal Procedure Code (Cap 68, 1985 Ed), s 189

Evidence — Inference — Trafficking in drugs — Inference of transportation

Evidence — Co-accused, evidence of — Confession of one accused used to implicate another accused — Principles to be applied — Evidence Act (Cap 97, 1990 Ed), s 30

The first appellant was arrested at Changi Airport with 1,370.3g of diamorphine strapped to her body. The second and third appellants were found to have strapped the drugs to the first appellant's body and were charged with abetment. The appellants' cautioned statements were admitted at trial and based on these statements they were called upon to enter their defence. The appellants remained silent and the trial judges found that they had 'no alternative' but to find the appellants guilty.

In her appeal the first appellant claimed that the trial judges were wrong to rely solely on the statements of her co-accused to infer that she had transported the drugs. All the appellants alleged that there had been a miscarriage of justice in that the trial judges had failed to consider whether the prosecution had proved its case beyond a reasonable doubt. All the appellants also claimed that cautioned statements should not have been admitted because the appellants had been cross-examined at the time of the recording of the statement.

Held, dismissing the appeals:

(1) From the primary facts adduced the only proper inference that could have been drawn was that the first appellant had travelled to Changi Airport with the drugs strapped to her body.

(2) Section 30 of the Evidence Act (Cap 97, 1990 Ed) allows the court to take a confession of a co-accused into consideration and thereby make it evidence. But it is not proof, and can be used only in support of other evidence and cannot be made the foundation of a conviction.

(3) The statements were not the foundation of the conviction of the first appellant.

(4) In a criminal trial there are two critical stages at which the court has to make a decision. At the close of the prosecution case the court has to decide whether the prosecution has made out a case, which if unrebutted, would warrant a conviction of the accused. In deciding this question or issue, the court ought not to consider whether the prosecution has proved the guilt of the accused beyond a reasonable doubt. At that stage, what the court had to decide was whether the evidence adduced, which was not inherently incredible and which, if accepted as accurate, would establish each essential element in the alleged offence. If the court so decided it must call for the defence. At that stage the court must keep an open mind about the veracity and accuracy of the evidence. After the defence had been called the court must proceed to examine the evidence adduced, assess the veracity and accuracy thereof and consider whether the prosecution had proved the guilt of the accused beyond a reasonable doubt.

(5) The trial judges had found that, on the evidence, the prosecution had proved its case against the appellants beyond a reasonable doubt.

(6) The purpose of s 122(6) of the Criminal Procedure Code was to inform the accused of the charge he was facing and to give him an opportunity of stating any fact on which he intended to rely in his defence in court and further to warn him that if he did not state it, then, his silence may give rise to an adverse inference against him.

(7) It was no part of the duty of the recorder of a s 122(6) statement to ask the accused any question in relation to what he said. Any cross-examination conducted by a recording officer was improper. Any other form of questioning, unless it was absolutely necessary, was wholly inadvisable and was to be discouraged.

(8) However, cross-examination per se did not render the statement inadmissible, if it was otherwise admissible. The admissibility of a statement recorded under s 122(6) was not governed by that section but, in the case where a statement was made to a police officer, was governed by s 122(5) of the Criminal Procedure Code, and in the case of a statement made to a narcotics officer, by the Evidence Act.

(9) Cross-examination could in certain circumstances render the statement or answers to the question inadmissible, if the questioning was so vigorous or prolonged that it became oppressive.

Cases referred to

1 *Bhuboni Sahu* v *The King* 1949 AIR 36 PC 257 (folld)
2 *Kashmira Singh* v *State of Madhya Pradesh* [1952] SC 526 (folld)
3 *Yusoff & Anor* v *PP* [1956] MLJ 47 (folld)
4 *PP* v *Nordin bin Johan & Anor* [1983] 2 MLJ 221 (folld)
5 *Haw Tua Tau* v *PP* [1981] 2 MLJ 49 (folld)
6 *Cheng Seng Heng & Ors* v *PP* [1949] MLJ 175 (refd)
7 *Tsang Yuk Chung* v *PP* [1990] 3 MLJ 264 (folld)
8 *PP* v *Tan Boon Tat* [1990] 2 MLJ 466 (folld)

Legislation referred to

Criminal Procedure Code (Cap 68, 1985 Ed) ss 122(5),(6), 189(1)
Evidence Act (Cap 97, 1990 Ed) s 30
Misuse of Drugs Act (Cap 185, 1985 Ed) s 5(a)
Supreme Court of Judicature Act (Cap 322, 1985 Ed) s 54

Chan Seng Onn (Deputy Senior State Counsel) for the respondent.
P Palakrishnan for the first appellant.
Denis Tan for the second appellant.
Lee Ah Fong for the third appellant.

Cur Adv Vult

Thean J (delivering the judgment of the court): The first appellant, Sim Ah Cheoh ('Sim'), a woman, was charged in the High Court under s 5(1) of the Misuse of Drugs Act (Cap 185, 1985 Ed) ('the Act') with trafficking in a substantial quantity of drugs, namely, ten packets containing not less than 1,370.3g of diamorphine, on 26 April 1985 by transporting them from Hotel Negara at Claymore Drive to Changi Airport. The second and third appellants, Tan Chong Ngee Ronald ('Tan') and Lim Joo Yin ('Lim'), were jointly charged under s 5(1) read with s 12 of the Act with abetting Sim in committing that offence. All three of them were tried jointly and were each found guilty of the charges and were convicted. Against the convictions, this appeal was brought, and at the conclusion of the hearing we dismissed it. We now give our reasons.

The evidence adduced by the prosecution which is not in dispute is this. Sometime in February 1985, Tan enquired of one of his friends, Loo Lian Seng, whether the latter knew anyone who might be willing to engage in smuggling 'precious stones'. In the following month, Loo furnished Tan with the name and telephone number of Sim and informed Tan that Sim might be interested. Sim at that time was heavily in debt due to excessive gambling and had indicated that she was so interested. As a result of the information given by Loo, Tan got in touch with Sim. Thereafter, Tan and Lim made all necessary arrangements for Sim to travel from Singapore to the United States of America: Tan assisted her in obtaining a visa to travel to the United States and Lim made a booking for her for the 'West Coast Panorama' tour of the United States organized by Sino-America Travel Corporation Pte Ltd ('SATCO') and paid for the cost of the tour. The tour was scheduled to depart from Singapore on 26 April 1985 at 3pm on Singapore Airlines flight SQ 2.

On 25 April 1985, Tan reserved a single room at Hotel Negara in his name. He checked into the hotel that evening and early in the following morning he left in a taxi for Pearl Bank Apartment. Sim lived in one of the flats in Pearl Bank Apartment. There was no evidence that Tan met Sim there that morning; but there was evidence that soon after his arrival at that block of apartments he took a Chinese woman in a taxi from there to Hotel Negara. There was evidence that on that morning Sim and Tan had breakfast at the Chinta Manis Coffee House in Hotel Negara. There was also evidence that soon after 10am, the same morning, a waiter, Ng Cheng Bye, served a plate of pork chop to Tan in his room. At about 12 noon, Tan checked out of the hotel. Again there was no evidence that Sim left the hotel with Tan. There was evidence, however, that Tan and a Chinese woman at the hotel took a taxi to the airport, and on arrival at the airport the Chinese woman alighted at the departure hall, while Tan remained in the taxi and returned to the city.

At the airport departure hall, at about 12 noon on 26 April 1985, officers from the Central Narcotics Bureau led by Chief Narcotics Officer Teo Ho Peng ('CNO Teo') were keeping a lookout for Sim. On the previous day, CNO Teo acting on information had been to SATCO and spoken to one Joanne Lam Yoke Chan, an employee of SATCO, who was to lead the 'West Coast Panorama' tour to the United States. He enquired about Sim and was informed that Sim was one of the 12 persons joining the tour and he was given a copy of the list of passengers. He instructed Joanne Lam to identify Sim and her luggage to him at the airport on the following day. Joanne Lim, on 26 April 1985, arrived at the airport at about 12.45pm. She had with her her passengers' flight tickets and passports, including those of Sim. At the airport, Joanne Lam met CNO Teo again and also a woman assistant narcotics officer Wong See Joon ('WNO Wong') and was reminded by CNO Teo of the arrangement. Joanne Lam was also instructed to check in Sim's luggage but ensure that it was not placed on a conveyor belt as the luggage would be searched.

Passengers for flight SQ 2 were to check in at counter 3 in the departure hall, and accordingly Joanne Lam proceeded to counter 3 with WNO Wong. In the vicinity of that counter, she saw Sim with her luggage and she approached Sim who identified herself as Sim. Joanne Lam then nodded to CNO Teo thus indicating that the person she spoke to was Sim. Joanne Lam then took Sim's luggage and checked in the same as instructed.

Among the narcotics officers who were at the departure hall was Senior Narcotics Officer Lim Chei Yoo ('SNO Lim'); he was the investigating officer with direct responsibility in the case, reporting, however, to CNO Teo. He took up his position close to counter 3 and saw CNO Teo and WNO Wong speaking to Joanne Lam. Subsequently, he saw CNO Teo signalling to him thus indicating Sim to him. Later, he saw Joanne Lam approaching Sim and handing her passport and boarding pass to her, following which Sim walked to the departure gate and passed through the immigration counter. SNO Lim and other narcotics officers trailed her. Sim proceeded to departure gate C32 and entered the screening room. In the screening room, SNO Lim approached her, identified himself and took possession of her passport. Other narcotics officers came and Sim was brought outside the screening room. There, another woman assistant narcotics officer Lim Peck Yan was present. SNO Lim instructed WNO Lim Peck Yan to act as an interpreter in Mandarin and told Sim that he was a narcotics officer. He asked Sim through WNO Lim Peck Yan whether she had any drugs in her possession, to which Sim replied, pointing to her chest, in Mandarin: 'Yes, few packets inside.' Later, Sim told SNO Lim that she did not know what the packets contained.

CNO Teo arrived at the departure gate soon afterwards and gave instructions for Sim to be searched. She was escorted to the search room and was searched by the two woman assistant narcotics officers, Wong See Joon and Lim Peck Yan, and was found to have cloth bags strapped or otherwise attached to her person. She was wearing an abdominal binder, a panty girdle and a thigh guard on each thigh. Two long cloth bags and three smaller bags were held in place under the abdominal binder. Under the panty girdle were two long cloth bags, one against each hip. A third bag was held by the girdle against Sim's abdomen. There was a long cloth bag under each thigh guard. Each of these bags, wrapped in masking tape, held a plastic packet containing white powder. In total there were ten packets.

Later, Sim was taken to the Central Narcotics Bureau. At the Bureau, Sim told SNO Lim that when she reached the United States she was to hand the drugs she was carrying to a person who would hand her a HK$100 note, the last digit of the serial number of which would be in a sequence to that of a HK$10 note in her possession. She handed the HK$10 note to SNO Lim.

Later in the afternoon, arrangements were made for a statement to be recorded from her under s 122(6) of the Criminal Procedure Code (Cap 68, 1985 Ed) ('CPC'). The recording officer was Senior Narcotics Officer S Vijakumar and the interpreter was Wu Nan Yong. The woman assistant narcotics officer, Wong See Joon, was also present. A statement was recorded from her, to which we shall revert in a moment.

Meanwhile, instructions had been given to narcotics officers to arrest Tan and Lim. They were arrested the same evening and brought to the Central Narcotics Bureau. When they were brought to SNO Lim's office at about 8.45pm, Sim was there, and on seeing Tan and Lim, she identified them to SNO Lim as being the persons who had assisted her. Sim was then escorted out to another room. Tan and Lim were searched and among the items found in Lim's person were (i) a slip of paper bearing the full name and identity card number of Sim and (ii) another slip of paper with Sim's full name on it, some figures and the legend 'S & USA' and two copies of a document containing flight details and an itinerary issued by SATCO. It was subsequently ascertained that the slip of paper described in (i) was written by Tan to Lim.

On the following day, arrangements were made for statements to be recorded from Tan and Lim under s 122(6) of the CPC. The recording officer was also SNO Vijakumar and the interpreter was Wu Nan Yong. Statements were recorded from both of them respectively to which we shall refer in a moment.

The contents of the ten packets found on Sim's person were analyzed and were found to contain not less than 1,370.3g of diamorphine.

At the trial, the admissibility of the statements made by the appellants respectively was objected to by their respective counsel on the ground that they were in each case not made voluntarily. A trial within a trial was held, and the trial judges at the conclusion found that each of the statements was made voluntarily. They were therefore admitted in evidence. The material part of the statement of Sim was as follows:

> I was made use by a male Chinese whose name I don't know. About a month ago he told me to smuggle diamonds and I agreed. About two weeks ago he told me to smuggle 'peh hoon' and the amount will only be one packet. I agreed as I thought the quantity is small. He also told me that even if I were to be arrested in US I would be jailed for a few years only. This morning at about 5am he fetched me from my home to a hotel in Orchard Road. Inside the hotel room another male Chinese took out and showed me ten packets of 'peh hoon' which were already packed. The first male Chinese asked me to strap them to my body. I told him I could not carry the ten packets of 'peh hoon' because it would be difficult to strap all to my body. He then told me that he has already promised someone in US to deliver ten packets of 'peh hoon'. Then I strapped the ten packets to my body. After strapping he gave me a piece of Hong Kong dollar note stating that the person who's to take delivery of the ten packets of 'peh hoon' will produce another Hong Kong dollar note, the last digit of the serial number being consecutive to that of mine.

The statement of Tan was as follows:

> On 26 April 1985 at 6.45am, 'Ah Hai' rang me up and told me to call 'Sum Ku Leong'. I then rang her and told her to come down to the ground floor of her Pearl Bank apartment. She came down and I brought her to Negara Hotel Room No 202. Here I received Ah Hai's telephone call and told him 'Sum Ku Leong' was with me. After a short while Ah Hai came into the room holding a black plastic bag in his hand. Ah Hai then took out some packets from the bag and I helped him to strap the packets onto Sum Ku Leong's body. After the strapping 'Sum Ku Leong' put on her suit and blouse and walked around to see whether the packets would drop or not. Then 'Ah Hai' told her to remove the strapping and re-strap the packets so that she would be able to remove it herself. 'Sum Ku Leong' did as told and when 'Ah Hai' was satisfied he left the room. Sum Ku Leong and myself then boarded a taxi to go to Changi Airport. At the airport she alighted while I left in the same taxi for home.

After the statement was taken, the recording officer, SNO Vijakumar, asked Tan certain questions which Tan answered, and the questions and answers were as follows:

> Q1 : In line 1 you mentioned 'Ah Hai'. Who is Ah Hai?
> A : Ah Hai was the male Chinese who was arrested with me on 26 April 1985. I do not know his real name.
> Q2 : In line 2 you mentioned 'Sum Ku Leong'. Who is Sum Ku Leong?
> A : She was the woman arrested before I was arrested. I also do not know her real name.
> Q3 : In line 9 you said Ah Hai took out some packets from the plastic bag. What do you think was inside the packets?
> A : I do not know but from the softness of the packets, I guessed it was 'peh hoon'.

The statement recorded from Lim was as follows:

> A male Chinese known to me only as 'Lau Tah' asked me once to get a person to deliver something. I then went to look for Ronald about getting someone for delivering something. Later Ronald told me he had found a female Chinese who is willing to deliver. When 'Lau Tah' rang me I told him I have a person who is willing to deliver. 'Lau Tah' then gave me money to buy clothing and air ticket to USA for the female Chinese whom Ronald and I called 'Ah Che'. At about 8am on 26 April 1985 'Lau Tah' handed me a plastic bag outside Negara Hotel and he left. I took this bag and went to a room in Hotel Negara where Ronald and 'Ah Che' were waiting for me. I then took out the packets from the plastic bag which 'Lau Tah' had given me earlier on and asked 'Ah Che' to strap them to her body. When I took the packets out I felt something soft inside them. All the packets were prepared and ready for strapping. Ronald and I helped 'Ah Che' to strap the packets. After this I left them.

The recording officer also asked Lim certain questions which Lim answered, and they were as follows:

Q1 : Who is 'Lau Tah' as mentioned by you in line 2.
A : 'Lau Tah' is in his 40's but I don't know his real name. I think he's a Singaporean.
Q2 : How long do you know 'Lau Tah'?
A : I know 'Lau Tah' for about four months.
Q3 : How did you come to know'Lau Tah'?
A : A Malaysian friend of mine 'Ah Tee' introduced me to 'Lau Tah' at a coffee-shop.
Q4 : In lines 2 and 3 you said 'Lau Tah' asked you to get someone to deliver something. What's the 'something'?
A : At first I did not bother about the 'something'. Later on I guessed it would be something illegal.
Q5 : Who is Ronald as mentioned in line 3 by you?
A : Ronald is my friend who was arrested on the same day as myself, that is on 26 April 1985.
Q6 : You said in lines 17 and 18 that when you took the packets out from the plastic bag, you felt something soft inside them. Did you know what was inside?
A : I guessed it was 'peh hoon'.

At the close of the case for the prosecution, counsel for the appellants respectively submitted that no case had been made out against the appellants, which, if unrebutted, would warrant their convictions on the charges against them. These arguments were rejected by the trial judges who held that a case had been made out and called upon the appellants to enter upon their defence. Each of the appellants elected not to give evidence or to call any evidence in their defence. The trial judges held that in the circumstances they 'had no alternative but to convict all three accused as charged'.

Before us, counsel for the appellants mounted three main arguments in support of the appeal. First, it was argued by counsel for Sim, who advanced this argument on behalf of all the appellants, that the prosecution had failed to prove an essential ingredient of the charge against Sim, namely, that Sim transported the drugs from Hotel Negara to Changi Airport (as described in the charge); that there was no evidence at all of such transportation, save for the statements recorded from the appellants, and that the finding of the trial judges that the ingredient of transportation had been established was based on an inference they drew and on the statements. It was not safe, so counsel submitted, to draw such inference of transportation, because there were competing rational inferences, and as for the statements they could not be relied upon as a foundation of the conviction of Sim. There was therefore a fatal gap or break in the evidence against Sim, and the charge against her had not been proved. In consequence, the charge against Tan and Lim for abetting Sim in trafficking in drugs could not stand.

There are two limbs in this argument. The first was directed to the proper inference that could be drawn from the evidence adduced as there was no direct evidence that Sim transported the drugs from Hotel Negara to Changi Airport. The direct relevant evidence which was not challenged or disputed established the following: that Tan had recruited Sim to smuggle 'precious stones'; that both Tan and Lim made all the necessary travelling arrangements for Sim to travel from Singapore to the United States; that early in the morning of 26 April 1985, Tan, who had on the previous night checked into Hotel Negara, went to Pearl Bank Apartment where Sim stayed, and from there he brought a Chinese woman to Hotel Negara; that in that morning a waitress at the coffee house in Hotel Negara served breakfast to Tan and Sim; that at about 10am a waiter served a plate of pork chop to Tan in his room; that at about 12 noon Tan checked out of the hotel and took a Chinese woman in a taxi to the airport where the woman alighted; that at the departure hall of Changi Airport Sim was identified by Joanne Lam to CNO Teo who then identified her to SNO Lim; that thenceforth Sim was under surveillance and was trailed to the departure gate C32 and the screening room where she was arrested, and that upon arrest she was found to have strapped to her person the ten packets, each containing white powder, which upon analysis were found to contain no less than 1,370.3g of diamorphine. From these primary facts the only proper inference that one can draw is that Sim was the woman who was brought from Pearl Bank Apartment to Hotel Negara, that she was also the woman who travelled with Tan in a taxi from Hotel Negara to Changi Airport and that she had with her during this journey the ten packets of white substance which were subsequently found strapped to her person. Counsel did not show us what other competing inference could sensibly and reasonably be drawn from these facts; when asked, his riposte was that it was for the prosecution to fill this gap in the evidence. In our opinion, these primary facts do not admit of any other inference; any other inference would, in the words of the trial judges, be wholly fanciful.

The second limb of the argument was directed to the three statements made by the appellants respectively

under s 122(6) of the CPC. It was argued that the only evidence which proved the essential ingredient of the charge against Sim, ie the transportation of the drugs from Hotel Negara to Changi Airport, consisted of the three statements and that each of these statements was a confession made by a co-accused which affected himself or herself (as the case may be) and the other accused and could not be relied on solely as a basis or foundation for sustaining the conviction of Sim and consequently the convictions of Tan and Lim. Where the other evidence adduced was insufficient to establish the charge or was wholly unsatisfactory there was no scope for a conviction of an accused on the sole basis of the confession of a co-accused. The basis of counsel's submission is s 30 of the Evidence Act (Cap 97, 1990 Ed) which provides as follows:

> When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the court may take into consideration such confession as against such other person as well as against the person who makes such confession. (Emphasis added.)

This section is in pari materia with s 30 of the Indian Evidence Act, and it has been decided in a series of Indian cases that under that section a confession of an accused implicating himself and his co-accused may be taken into consideration along with other evidence and a conviction based only on such confession cannot stand. These cases have thus given a narrow construction to the words 'may take into consideration' in that section. Counsel referred us to numerous cases, among which were: *Bhuboni Sahu* v *The King*[1] and *Kashmira Singh* v *State of Madhya Pradesh*.[2] In *Bhuboni Sahu*,[1] which was an appeal to the Privy Council, the evidence consisted of mainly the confession of a co-accused which implicated the co-accused and the appellant and the Privy Council held, among other things, that this confession was not sufficient to sustain the conviction of the appellant of murder and the conviction was set aside. Sir John Beaumont in delivering the judgment of the Board said, at p 260:

> Section 30 seems to be based on the view that an admission by an accused person of his own guilt affords some sort of sanction in support of the truth of his confession against others as well as himself. But a confession of a co-accused is obviously evidence of a very weak type. It does not indeed come within the definition of 'evidence' contained in s 8, Evidence Act. It is not required to be given on oath, nor in the presence of the accused, and it cannot be tested by cross-examination. It is a much weaker type of evidence than the evidence of an approver which is not subject to any of those infirmities. Section 30, however, provides that the court may take the confession into consideration and thereby, no doubt, makes it evidence on which the court may act; but the section does not say that the confession is to amount to proof. Clearly there must be other evidence. The confession is only one element in the consideration of all the facts proved in the case; it can be put into the scale and weighed with the other evidence. The Lordships think that the view which has prevailed in most of the High Courts in India, namely that the confession of a co-accused can be used only in support of other evidence and cannot be made the foundation of a conviction, is correct.

In *Kashmira Singh*,[2] the Supreme Court of India held that the evidence for the conviction of the accused of murder, which was based substantially on the evidence of a confession of a co-accused implicating himself and the accused, was insufficient and set aside the conviction of murder. Vivian Bose J said, at pp 529-530:

> In our opinion, the matter was put succinctly by Sir Lawrence Jenkins in *Emperor* v *Lalit Mohan Chuckerbutty* [1911] ILR 38 Cal 559 at 588 where he said that such a confession can only be used to 'lend assurance to other evidence against a co-accused' or, to put it in another way, as Reilly J did in *In re Periyaswami Moopan* [1931] ILR 54 Mad 75 at 77:
>
> 'the provision goes no further than this — where there is evidence against the co-accused sufficient, if believed, to support his conviction, then the kind of confession described in s 30 may be thrown into the scale as an additional reason for believing that evidence.'
>
> Translating these observations into concrete terms they come to this. The proper way to approach a case of this kind is, first, to marshal the evidence against the accused excluding the confession altogether from consideration and see whether, *if it is believed,* a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the judge is not prepared to act on the other evidence as it stands even though, *if believed,* it would be sufficient to sustain a conviction. In such an event the judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept.

Similarly, the courts in Malaysia have also adopted the same construction of the words 'may take into consideration' in the corresponding provision, namely, s 30 of the Malaysian Evidence Act 1950. In *Yusoff & Anor* v *PP*[3] at pp 48-49 Mathew CJ said:

> ... even accepting the confession of the second appellant as being both voluntary and true, there is the question whether the confession was sufficient to establish the guilt of the first appellant. Section 30 of the Evidence Ordinance reads:
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> 'When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the court *may take into consideration* such confession as against such other person as well as against the person who makes such confession.' (The emphasis is ours).

The effect of the words 'may take into consideration' is well set out in *Woodroffe and Ameer Ali's Law of Evidence* (9th Ed) at pp 312 and 313, as follows:

> 'These words do not mean that the confession is to have the force of sworn evidence, but such a confession is nevertheless evidence in the sense that it is matter which the court, before whom it is made, may take into consideration in order to determine whether the issue of guilt is proved or not. The wording, however, of this

section (which is an exception) shows that such a confession is merely to be an element in the consideration of all the facts of the case; while allowing it to be so considered, it does not do away with the necessity of other evidence.'

The other evidence is of little, if of any, value and merely shows that the two appellants were seen together about midnight on 19/20 September 1955. In fact, the convictions rest entirely on the confession of the second appellant which we have already pointed out is wrong.

Similar pronouncement was made by the Federal Court of Malaysia in *PP* v *Nordin bin Johan & Anor*[4] at p 222.

These cases are undoubted authorities on the construction and application of s 30 of the Evidence Act and we respectfully agree with the views expressed in these decisions. However, on the evidence before us, this argument on behalf of the appellants must fail. We revert again, very briefly, to the statements made by the appellants respectively. Sim's statement was evidence against herself as to possession of the heroin and of the preparatory steps taken to carry them to the United States. Tan's statement was evidence against (i) Sim as to possession and transportation of the heroin by Sim from Hotel Negara to Changi Airport and (ii) himself as to abetting Sim in strapping the heroin to her person and in transporting them. Lim's statement was evidence against himself as to possession of the heroin and abetting Sim in strapping the heroin to her person with a view to transporting them. These statements were not the only evidence against Sim as to transportation of the heroin. There was a preponderance of other evidence against Sim on that point. As we have demonstrated, there were primary facts which had been established by direct evidence and which, in our view, led inescapably to the inference that she carried the heroin from Hotel Negara to Changi Airport. Accordingly, in our judgment, these statements were not the foundation of the conviction of Sim of the offence with which she was charged. They 'lent assurance to the other evidence'. In so far as the convictions of Tan and Lim are concerned their statements as against them respectively were evidence of the parts they played respectively in assisting Sim in the transportation of the heroin and can be relied upon. Again, there was also other evidence that they assisted Sim. We accordingly rejected the first argument submitted on behalf of the appellants.

The second argument mounted by counsel for Sim, who again advanced this argument on behalf of all the appellants, was that there was a miscarriage of justice in that the trial judges failed to consider whether the prosecution had proved its case beyond a reasonable doubt. After the appellants were called upon by the trial judges to enter upon their defence, they elected not to give evidence or to call any evidence in their defence. The trial judges in their grounds of decision said:

Accordingly, we found that a case against all three accused had been made out which, if unrebutted, would warrant their conviction. They were called upon to make their defence, and were given the standard allocution. Counsel then asked for an adjournment, which was granted. Upon resumption of the trial counsel for Sim, speaking for himself and for counsel representing Tan and Lim, informed us that each accused had decided not to give evidence, and not to call other evidence, all the accused standing on the submissions of their respective counsel that the prosecution had failed to prove transportation beyond reasonable doubt.

In the result, we had no alternative but to convict all those accused as charged. We did so, and sentenced them to death.

The criticism made by counsel on the last paragraph of the grounds of decision was that the trial judges at that juncture did not proceed to examine and assess the evidence adduced and consider whether the prosecution had proved its case beyond a reasonable doubt; the test which the trial judges applied in deciding to call upon the appellants to enter on their defence is not the same as that in deliberating on the guilt of the appellants at the end of the trial. In support, counsel relied on the following passage of the judgment of Lord Diplock in *Haw Tua Tau* v *PP*[5] at p 52:

At the conclusion of the prosecution's case what has to be decided remains a question of law only. As decider of law, the judge must consider whether there is some evidence (not inherently incredible) which, if he were to accept it as accurate, would establish each essential element in the alleged offence. If such evidence as respects any of those essential elements is lacking, then, and then only, is he justified in finding 'that no case against the accused has been made out which if unrebutted would warrant his conviction', within the meaning of s 188(1). Where he has not so found, he must call upon the accused to enter upon his defence, and as decider of fact must keep an open mind as to the accuracy of any of the prosecution's witnesses until the defence has tendered such evidence, if any, by the accused or other witnesses as it may want to call and counsel on both sides have addressed to the judge such arguments and comments on the evidence as they may wish to advance.

Technically and in so far as the last paragraph of the grounds of decision of the trial judges is concerned, the point made by counsel is valid. In a criminal trial there are two critical stages at which the court has to make a decision. Under s 189(1) of the CPC, at the close of the case for the prosecution, the court has to decide whether the prosecution has made out a case, which, if unrebutted, would warrant a conviction of the accused. In deciding this question or issue, the court ought not to consider whether the possession has proved the guilt of the accused beyond a reasonable doubt. Lord Diplock in *Haw Tua Tau*[5] said, at p 51:

The crucial words in s [189(1)] are the words 'if unrebutted', which make the question that the court has to ask itself a purely hypothetical one. The prosecution makes out a case against the accused by adducing evidence of primary facts. It is to such evidence that the words 'if unrebutted' refer. What they mean is that for the purpose of reaching the decision called for by s [189(1)] the court must act on

the presumptions (a) that all such evidence of primary fact is true, unless it is inherently so incredible that no reasonable person would accept it as being true; and (b) that there will be nothing to displace those inferences as to further facts or to the state of mind of the accused which would reasonably be drawn from the primary facts in the absence of any further explanation.

At that stage, what the court has to decide is whether the evidence adduced, which is not inherently incredible and which, if it were accepted as accurate, would establish each essential element in the alleged offence. If the court so decides that each essential element in the alleged offence has been established he must call for the defence. At that stage, however, he must keep an open mind about the veracity and accuracy of the evidence. After the defence has been called and evidence, if any, of the accused and other witnesses has been tendered and counsel for both sides have made their respective closing submissions, the court must, at that stage, proceed to examine the evidence adduced, assess the veracity and accuracy thereof and consider whether the prosecution has proved the guilt of the accused beyond a reasonable doubt.

In the instant case, the trial judges did not spell out in the last paragraph of their grounds of decision that at the second or final stage of the trial they had considered all the evidence and found that the guilt of the appellants had been proved beyond a reasonable doubt. However, at the trial in making their findings on the guilt of the appellants they said:

> Please tell the first accused that we find her guilty as charged and we accordingly convict her of the offence with which she has been charged. Similarly, please tell the second accused Ronald Tan Cheng Ngee that we are again satisfied beyond reasonable doubt that he is guilty as charged and we convict him accordingly. And thirdly, please tell the accused Lim Joo Yin that we are also satisfied beyond a reasonable doubt that he is guilty as charged and we convict him accordingly.

Therefore, having regard to these findings and the evidence before them, the trial judges must have found that on the evidence the prosecution had proved its case against the appellants beyond any reasonable doubt, though they did not explicitly say so in the concluding part of their grounds of decision. That they had reached the conclusion that a case beyond any reasonable doubt had been established by the prosecution was also evident from the following passage of their grounds of decision:

> In our judgment, the objective facts established by the evidence allowed of only one sensible inference. The statements of all three accused established that the packets containing the drugs were strapped to Sim's person in a room at Hotel Negara. Tan and Lim assisted in the strapping operation. Tan's statement made it clear that after the packets had been strapped on for the first time, Sim dressed and walked about the room to ensure that the packets were secure. Lim then instructed her to remove the packets, and restrap them onto herself so that she would be able to unstrap them on her own. Sim did as she was told, and only when Lim was satisfied did he leave the room. Tan's statement went on to say that he and Sim 'then boarded a taxi to go to Changi Airport'. At the airport, Sim disembarked and Tan proceeded back to his house in the same taxi.
>
> To suggest, in the face of that evidence, that the packets having been strapped onto Sim for the second time to Lim's satisfaction in Hotel Negara, they were then removed, were not transported by Sim in the taxi, but rematerialized at the airport for her to have strapped them on there, was in our view wholly fanciful.

Having reached that conclusion and in view of the fact that the defence had not tendered any evidence by the appellants or any other witness the trial judges probably considered that it would be tautologous to repeat the same exercise. It seems to us that for that reason they said they had no alternative but to convict the appellants.

Assuming that there was an error made by the trial judges, as contended on behalf of the appellants, in our judgment, no miscarriage of justice at all has occurred in this case. The evidence against Sim was overwhelming, and so also was the evidence against Tan and Lim. Apart from the admissibility of the three statements of the appellants, there was substantially no dispute on the evidence adduced by the prosecution in any material respect. As for those statements, their admissibility was challenged but the trial judges, after the trial within a trial, were satisfied beyond reasonable doubt that they were made voluntarily, and, accordingly, they were admitted in evidence. In our judgment, on such evidence, the trial judges could not have reached any other conclusion than that the guilt of the appellants had been proved beyond a reasonable doubt. Plainly, this is a case where the proviso to s 54 of the Supreme Court of Judicature Act (Cap 322, 1985 Ed) is applicable.

Finally, counsel for the appellants sought to impeach the findings of the trial judges that the statements recorded from the appellants respectively under s 122(6) of the CPC were given by them voluntarily. These are purely findings of fact. The trial judges had considered the evidence given by the appellants and also the evidence given by the prosecution witnesses. They rejected the evidence of the appellants and accepted the evidence of SNO Lim, SNO Vijakumar and Wu Nan Yong, and found that the statements were made by the appellants voluntarily. The trial judges, on the evidence before them, were justified in coming to such findings. There is, however, one argument advanced by counsel for Tan and Lim which merits consideration.

In recording the statements from Tan and Lim respectively, SNO Vijakumar asked them several questions on the statements and the answers were given by them respectively. It was argued by counsel that SNO Vijakumar cross-examined them on the statements recorded, and such cross-examinations were improper

and rendered the statements inadmissible. The trial judges considered the evidence and the explanation given by SNO Vijakumar for asking the questions, and held that the questions were not put to them by way of cross-examination. We are unable to agree with the views of the trial judges on this point. In our opinion, the questions asked were more than those truly required for clarification. They were asked with a view to eliciting answers from the maker of the statement which would be evidence favourable to the party questioning. SNO Vijakumar need not have asked, and ought not to have asked, those questions. The purpose of s 122(6) of the CPC is to inform the accused of the charge he is facing and to give him an opportunity of stating any fact on which he intends to rely in his defence in court and further to warn him that if he does not state it then, his silence may give rise to an adverse inference against him. The role of a recording officer is spelled out in s 122(6): to prefer and read out the charge to the accused or to inform him officially of the charge, to serve on him a notice in writing in terms as prescribed in that subsection, to explain the notice to him, and thereafter if the accused wishes to say anything, to record accurately what he says. It is no part of the duty of such recording officer to ask the accused any question in relation to what he said. In our opinion, any cross-examination conducted by a recording officer on the statement taken from the accused under s 122(6) is improper, and we disapprove it. Any other form of questioning, unless it is absolutely necessary, is wholly inadvisable and is to be discouraged.

The next question is whether by reason of such cross-examination the statements made by Tan and Lim are admissible. The trial judges appeared to take the view that where an accused person makes a statement under s 122(6) of the CPC, questions asked by the recording officer by way of cross-examination are improper and render the resultant statement inadmissible and accepted the case of *Cheng Seng Heng & Ors* v *PP*[6] as the authority. That was a case decided by the Court of Appeal of the Federation of Malaya on the basis of reg 33 of the Emergency Regulations 1948, and Spenser-Wilkinson J in delivering the judgment of the court, after referring to some English and local authorities, said, at p 178:

> On the principles enunciated in the above-quoted authorities we hold that under reg 33 of the Emergency Regulations the police have no right to elicit statements from accused persons by means of cross-examination or anything in the nature of cross-examination. The only safe rule to be followed when statements are being taken from accused persons by the police under reg 33 is r 7 of the Judges' Rules set out above and any departure from this rule will render the statements inadmissible in evidence.

The Judges' Rules referred to in the judgment are the Judges' Rules then in force in England, and r 7 thereof was identical with r 8 of Sch E to proviso (b) of sub-s (5) of s 121 of the Criminal Procedure Code then in force. But sub-s (5) (which was the precursor of the existing sub-s (6) of s 122) and Sch E were introduced to the Criminal Procedure Code by the Criminal Procedure Code (Amendment) Act 1960. Section 121 (now s 122) by sub-s (5) thereof for the first time allowed a statement made at any time by a person who is charged with an offence in the hearing of a police officer of or above the rank of inspector to be admissible in evidence at his trial, but such admission was expressly made subject to two provisos, namely: (i) proviso (a) which was in pari materia with the proviso to the existing s 122(5), and (ii) proviso (b) which is as follows:

> (b) in the case of a statement made by such person after his arrest if it appears to the court that the statement was not made and recorded substantially in compliance with the provisions of the rules set out in Schedule E to this Code.

And r 8 of the Rules as set out in Sch E to the Code provided:

> A prisoner making a voluntary statement must not be cross-examined, and no questions shall be put to him about it except for the purpose of removing ambiguity in what he has actually said. For instance, if he has mentioned an hour without saying whether it was morning or evening, or has given a day of the week and day of the month which do not agree, or has not made it clear to what individual or what place is intended to refer in some part of his statement, he may be questioned sufficiently to clear up the point.

By the Criminal Procedure Code (Amendment) Act 1976 (which came into force on 1 January 1977), among other things, the proviso (b) to the then s 121(5) and Sch E were repealed, and the present sub-s (6) of s 122 was introduced. Hence, with the repeal of those provisions, there is nothing in s 122 to say that a statement recorded from an accused under s 122(6) is inadmissible in evidence if in the course of or after recording the statement the accused is cross-examined thereon by the recording officer. In our opinion, cross-examination per se does not render the statement inadmissible, if it is otherwise admissible. The admissibility of a statement recorded under s 122(6) is not governed by that subsection but, in the case where a statement is made to a police officer, is governed by s 122(5) of the CPC: see *Tsang Yuk Chung* v *PP*,[7] and in the case of a statement made to a narcotics officer, as in this case, by the Evidence Act: see *PP* v *Tan Boon Tat*.[8] In *Tsang Yuk Chung*,[7] Wee Chong Jin CJ, in delivering the judgment of the Court of Criminal Appeal, said, at p 266:

> Section 122(6) itself does not provide for the admissibility of statements recorded thereunder. The admissibility of such statements must still be founded upon s 122(5) as one of the exceptions to s 122(1) which, prima facie, prohibits the use in evidence of any statement made by any person to a police officer in the course of a police investigation.

That s 122(5) governs the admissibility of statements made under s 122(6) is confirmed by s 122(7), which reads:

> No statement made by an accused person in answer to a written notice served on him pursuant to sub-s (6) shall be construed as a statement caused by any inducement, threat or promise as is described in the proviso to sub-s (5), if it is otherwise voluntary.

In our judgment, a statement whether or not it is purported to have been made under s 122(6) is admissible in evidence so long as s 122(5) is satisfied. There is no doubt that an inculpatory statement so admitted is evidence of the facts stated therein.

However, cross-examination could in certain circumstances render the statement or the answers to the questions inadmissible, eg if the questioning is so vigorous or prolonged that it becomes oppressive with the result that a doubt arises as to whether the statement or the answers have been caused by any fear or threat. Such, however, was not the case.

In the result, all the arguments advanced on behalf of the appellants failed and the appeal was accordingly dismissed.

Appeal dismissed.

Solicitors: *Palakrishnan & Partners; Toh Tan & Partners; Ng Lee & Partners.*

Reported by *Mathavan Devadas*

Tong Guan Food Products Pte Ltd v Hoe Huat Hng Foodstuff Pte Ltd

COURT OF APPEAL (SINGAPORE) — CIVIL APPEAL NO 61 OF 1990
YONG PUNG HOW CJ, LAI KEW CHAI AND GOH JOON SENG JJ
30 MAY 1991

Tort — Passing-off — Whether the respondent's get-up bore such similarity to the appellant's that the public would be deceived or confused into believing the respondent's goods to be that of the appellant's

The appellant took out an interim injunction contending that the respondent's packaging and marketing of its cashew nuts and almonds is similar to their own such that such similarity was bound to deceive or cause confusion to the public into believing that the respondent's products are associated with or connected to their business, and that would cause irreparable loss and damage to their goodwill and reputation.

The appellant markets and sells peanuts, cashew nuts and almond products under the brand name 'Tong Garden'. In 1983, the appellant started to package its products in aluminium foil in dark blue and white with arc colour separation.

The respondent also sells the same products under the brand name 'Deer Brand', which they market in aluminium foil packs of dark blue and white with arc colour separation.

The judicial commissioner held that the appellant had failed to prove any reputation in respect of its aluminium foil pack for its cashew nuts and almonds, and that there had been no misrepresentation by the respondent. He dismissed the claim with costs, and the appellant appealed.

Held, dismissing the appeal:

(1) The appellant has not proven reputation in the get-up, that there had been misrepresentation, or that it had suffered damage.

(2) In order to show that the get-up is well-known, the appellant must prove that the mark, name or other indicia on which they rely is well-known in connection with a business in which it has goodwill, or with goods connected with that business, and is distinctive of those goods or that business.

(3) In this case, the appellant's packaging is very ordinary; further, the public knows the appellant's products by its name rather than its get-up. The appellant's get-up had been in use for five years, there had been changes in the get-up, it had not been registered as a trade mark, and there is no evidence that the market had identified the get-up with the appellant's products.

(4) In order to show that there was misrepresentation, the test to be applied is whether ordinary sensible members of the public would be confused, which is a question of fact, to be decided in the light of surrounding circumstances. Further, the court has also to take into account the nature of the purchasing public, the extent of confusion and the way in which confusion arises. The test for comparison of confusingly similar names, marks or other distinguishing indicia is not to compare them side by side but to take into account the fact that confusion which may occur will take place when the customer has in his mind his recollection of the appellant's mark which may be only an idea of the whole or actual mark.

(5) In this case, the point to be decided is whether, having regard to all the circumstances of the case, the use by